

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1245
77-1246

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 77-1245, 77-1246

UNITED STATES OF AMERICA,

Appellee,

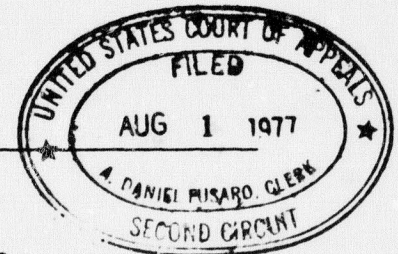
v.

VANKIRK MOORE and HAROLD BURNELL,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT
HAROLD BURNELL



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UNITED STATES OF AMERICA,

Appellee,

v.

VANKIRK MOORE and HAROLD BURNELL,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT
HAROLD BURNELL

Defendant-appellant Harold Burnell appeals from a judgment entered on April 22, 1977 by the United States District Court for the Southern District of New York, after a trial before the Honorable Vincent L. Broderick, U.S.D.J., and a jury, adjudging defendant-appellant Harold Burnell guilty of conspiring to kidnap Henry Buster Huggins, Jr. and to transport him in interstate or foreign commerce in

violation of 18 U.S.C. § 1201(c) (Count One); kidnapping Mr. Huggins and transporting him in interstate or foreign commerce in violation of 18 U.S.C. § 1201(a)(1) (Count Two); conspiring to transmit in interstate commerce a demand for a ransom for the release of Mr. Huggins in violation of 18 U.S.C. §§ 371 and 875(a) (Count Three); and transmitting in interstate commerce a demand for a ransom for the release of Mr. Huggins in violation of 18 U.S.C. § 875(a) (Count Four). Burnell's codefendant, defendant-appellant Vankirk Moore, was adjudged guilty of the same charges. Both Burnell and Moore were sentenced to concurrent terms of ten years on Count One, life imprisonment on Count Two, and 5 years on Counts Three and Four.

ISSUES PRESENTED

1. Does the statutory presumption of 18 U.S.C. § 1201(b), that a kidnapped person who has not been released within 24 hours has been transported in interstate or foreign commerce in violation of 18 U.S.C. § 1201(a)(1), violate the United States Constitution, and was the District Court's instruction that the jury could rely upon this presumption in finding that Mr. Huggins was transported in interstate or foreign commerce plain error affecting the substantial rights of defendant-appellant Harold Burnell?

2. Should the District Court have granted Burnell's motion for a judgment of acquittal on Counts One and Two of the

indictment on the ground that there was insufficient evidence that Burnell transported or conspired to transport Mr. Huggins in interstate or foreign commerce?

3. Should the District Court have granted Burnell's motion for a judgment of acquittal on Counts Three and Four of the indictment on the ground that there was insufficient evidence that Burnell transmitted or conspired to transmit in interstate commerce a demand for a ransom for the release of Mr. Huggins?

STATEMENT OF THE CASE

A. The Disappearance of Mr. Huggins

At the time of his disappearance, Henry Buster Huggins, Jr. was 40 years old (A167-A168*). He was the proprietor of H & S Transmissions in the Bronx (Tr. 128, 366). He was also a seller of narcotic drugs, including both cocaine and heroin (Tr. 160-161, 375-376, 650). Mr. Huggins lived part time with his two daughters, and part time with his common law wife, Miss Martha Wigfall (Tr. 126, 751). He also had other girl friends, including Miss Janet Lee, whom he saw perhaps two or three times a week (Tr. 734, 752-753, 820).

Defendant-appellant Harold Burnell worked part time

* "A" citations are to the portions of the record reproduced in the Appendix. "Tr." citations are to the transcript of the trial.

at H & S Transmissions (Tr. 129, 367). He lived in Apartment 3A at 1818 Anthony Avenue in the Bronx (Tr. 736). Miss Janet Lee, Mr. Huggins's girl friend, lived in Apartment 5F in the same building (Tr. 734). Defendant-appellant Vankirk Moore, also known as "Tico", was a friend of Burnell (Tr. 736-737).

Robert Clement, who worked for Mr. Huggins at H & S Transmissions (Tr. 641-642), testified that at about 4:15 or 4:30 P.M. on Wednesday, December 1, 1976 he saw Mr. Huggins talking to Burnell at H & S Transmissions (Tr. 644).^{*} Miss Janet Lee, Mr. Huggins's girl friend, testified that at about 5:00 P.M. she telephoned Mr. Huggins at the Old Colony Bar at 127th Street and Lenox Avenue in Manhattan to ask if Mr. Huggins was going to pick her up from work, and that Mr. Huggins said that he was busy and would talk to her later (Tr. 737-738). Miss Lee testified that at about 6:00 P.M. she went home to her apartment at 1818 Anthony Avenue in the Bronx, and that on the way up to her apartment she stopped at Burnell's apartment, where she spoke with Vankirk Moore (Tr. 736-737, 784-786).

At about 7:30 P.M., Miss Lee testified, Mr. Huggins came to her apartment for about 15 minutes, made a couple of telephone calls, asked Miss Lee which apartment Burnell lived

^{*} On cross-examination, Mr. Clement admitted that on December 6, 1976 he had told two FBI agents that it was on the afternoon of Tuesday, November 30, 1976, rather than Wednesday, December 1, 1976, that he saw Mr. Huggins conversing with Burnell (Tr. 690-691), and that he had not changed his account of the date until January 21, 1977, when he was told by the FBI that he probably had the dates mixed up (Tr. 693-695).

in, and telephoned Burnell and told him he was on his way downstairs (Tr. 740). Miss Lee testified that she walked Mr. Huggins to the elevator and pushed the button for the third floor, and that Mr. Huggins said that he would be back in 10 or 15 minutes (Tr. 740-741). About 10 minutes later, Burnell came to Miss Lee's apartment, said that Mr. Huggins had not come down, and asked where Mr. Huggins was (Tr. 742). When Miss Lee said that Mr. Huggins had gone down to the third floor, Burnell said that he would try to catch Mr. Huggins (Tr. 743). Shortly thereafter, Burnell rang Miss Lee over the intercom and told her that he had not found Mr. Huggins but that his car was still parked in front of the building (ibid.). About five minutes later Mr. Burnell rang Miss Lee back over the intercom and said that he had not seen Mr. Huggins and that his car was gone (ibid.). 7

Neither Miss Lee nor any other witness saw Mr. Huggins at any time thereafter (Tr. 744).* Mr. Huggins has never been found.

B. The Telephone Calls to
Mr. Huggins's Relatives

At about 9:30 P.M. on Wednesday, December 1, 1976 the telephone rang in Martha Wigfall's apartment in the Bronx,

* Miss Lee, like Mr. Clement, originally told the FBI that she had last seen Mr. Huggins on Tuesday, November 30, 1976, rather than Wednesday, December 1, 1976 (Tr. 757), and did not change her account of the date until she was interviewed by the FBI on January 19, 1977 (Tr. 763-764).

and was answered by Miss Wigfall's 18-year-old brother, Lorenzo Mark Wigfall, who was alone in the apartment (Tr. 227, 229-230). The caller asked whether he was Martha's brother, and he said he was (Tr. 230). The caller then said:

"Well, Mark, listen and listen carefully. You are to tell Martha that we have Buster and he owe us \$250,000, and Martha and Mr. Huggins [Sr.] are to meet them at the shop, Martha and Mr. Huggins are to meet them at the shop at - and they are not to - they are not to be followed by no cop or we'll kill him." (Tr. 230.)

After saying this, the caller hung up (Tr. 230).

Between 9:30 and 10:00 P.M. on Wednesday, December 1, 1976 the telephone rang at the home of Mr. Huggins's parents in Charleston, South Carolina, and was answered by Ira Huggins, Mr. Huggins's 16-year-old brother (A167, A169, A195). As he answered, Ira Huggins heard the operator say, "35 cents more," and then a man came on and asked to speak to Buster Huggins, Sr. (A195). When Ira Huggins said that his father was not in, the man asked to speak to his mother (ibid.). Ira Huggins testified that he called his mother and then listened in after his mother answered on the extension in her bedroom (A195-A196). The man told Mrs. Huggins that her son was kidnapped and that he was asking for a quarter of a million dollars (A168-A169, A196). Then Mr. Huggins himself got on the telephone and said, "Mom, do what these men say" (A169, A196). Then the first caller returned to the telephone and said that he wanted Buster Huggins, Sr. and Martha Wigfall to meet him at the garage at 4 o'clock on Friday with a quarter

of a million dollars (ibid.).

Between 6:00 and 6:30 A.M. on Thursday, December 2, 1976 the telephone rang again in Miss Wigfall's apartment in the Bronx and was answered by Miss Wigfall (Tr. 134). The caller said, "Did you get my message?" (Tr. 135.) Miss Wigfall said, "What message?" (Ibid.) The caller said that they had Buster and that they wanted \$250,000, and that Miss Wigfall and Mr. Huggins, Sr. should bring the money over to the shop at 4 o'clock on Friday (ibid.). Miss Wigfall asked to speak to Buster, and the caller said that Buster had already spoken to his mother the night before (ibid.).

During the afternoon of Thursday, December 2, 1976, the FBI, with the consent of Miss Wigfall, placed a recording device on the telephone in Miss Wigfall's apartment (Tr. 137-138). At 1:35 A.M. on Friday, December 3, 1976 the telephone rang in Miss Wigfall's apartment, and Miss Wigfall's brother Mark again answered it (Tr. 232). Mark Wigfall testified that the voice was the same as the first call he had received (ibid.). The caller asked for Miss Wigfall, but Mark Wigfall said that she was not in (ibid.). The caller stated that Miss Wigfall should be at the garage at 4 o'clock with the money in a paper bag (ibid.). This telephone conversation was recorded, and the tape on which the conversation was recorded was admitted into evidence as Government Exhibit 1 (Tr. 233-235).

On the afternoon of Friday, December 3, 1976 Miss Wigfall and Samuel Huggins, Mr. Huggins's brother, went to

H & S Transmissions (Tr. 139). At about 4:00 or 4:10 P.M. the telephone rang, and Miss Wigfall answered it (ibid.). She testified that the caller was the same man she had spoken to on Thursday morning, and that he asked her how much she had (Tr. 139-140). When she said that she had \$50,000, the caller said that that was not what they wanted, and that he would give her another 24 hours to have the balance (Tr. 140). He instructed her to be at the same place with the rest of the money at 4:00 P.M. the next day, Saturday, December 4, 1976 (ibid.).

At about 11:30 P.M. on Friday evening, December 3, 1976, Miss Wigfall received a telephone call at her apartment from a second man who identified himself as "Buster's boss" (Tr. 141). In the course of a lengthy conversation, the man said that he was calling to find out whether they were going to get the money, because he was getting ready to take Mr. Huggins out of town that night (GX 1; cf. Tr. 142-143). Miss Wigfall asked to speak to Mr. Huggins, and the man said that he had spoken with his mother (GX 1; cf. Tr. 142). This telephone call was likewise recorded, and the tape on which the call was recorded was admitted into evidence as Government Exhibit 1 (Tr. 144-145).

On the afternoon of Saturday, December 4, 1976, Miss Wigfall and Samuel Huggins, accompanied by FBI agents, again went to H & S Transmissions (Tr. 146). A recording device was placed on the telephone at H & S Transmissions (ibid.). At

4:34 P.M. Miss Wigfall received a call from the first man who had called her, who asked how much money she had now (Tr. 146-147). Miss Wigfall said that she had \$100,000 or a little better, and the man said that his boss would call her back in about 10 minutes (Tr. 147). About 10 minutes later, Miss Wigfall received a call from a man who sounded like the second man who had called her (ibid.). After asking how much money Miss Wigfall had and saying that Mr. Huggins was worth more, the man asked whether she knew anything about a brown van parked before the shop, saying that if she was followed they would call it off (Tr. 147-148). The man then said that she would receive a call in three minutes with instructions (Tr. 148). Miss Wigfall then received another call from the first man, who instructed her to go to the two telephone booths in the parking lot between the Nathan's and Jack in the Box establishments opposite the Korvette's shopping center on White Plains Road in the Bronx, and to pick up the telephone which would ring in about 20 minutes (Tr. 149). All three of these conversations were recorded, and the tape containing these conversations was admitted into evidence as Government Exhibit 2 (Tr. 149-151).

C. The Arrest of
the Defendants

After receiving the three telephone calls at H & S Transmissions, Miss Wigfall and Samuel Huggins drove to the telephone booths in the Nathan's parking lot opposite the

Korvette's shopping center in the Bronx and waited for the telephone to ring (Tr. 149, 152). When the telephone rang, it was the second man who had called her (Tr. 152). He told Miss Wigfall to take the money to the Rocky Point Lookout on the Palisades Interstate Parkway in New Jersey, where she would find three garbage cans, and to drop the money in the middle garbage can (Tr. 152-153). Then, he said, she should return to the same telephone at about 8:30 P.M., and she would get a call saying where she could find Buster (Tr. 153). Miss Wigfall told the caller that he was crazy, and refused to follow his instructions (ibid.). The caller said "What's wrong with you?" and hung up (ibid.).

Meanwhile, a few minutes before 5:00 P.M., two FBI agents had been instructed by radio to maintain surveillance over the telephone booths located outside the Nathan's opposite the Korvette shopping center (Tr. 952). As they were driving through the Korvette parking area, trying to find a spot from which they could observe the telephone booths, they noticed two individuals sitting in a brown Buick Wildcat bearing South Carolina license NMV-109, which they already knew to be Burnell's automobile (Tr. 950-953, 1110). The FBI agents parked in the row behind Burnell's automobile and placed it under surveillance (Tr. 953, 1110). Burnell's automobile then pulled out of the parking space and headed toward the Korvette store (Tr. 953-954, 1110). When the agents caught up with Burnell's automobile, it was double parked next to the northwest corner of the Korvette

store; the driver was still in the automobile, and the passenger was standing at a telephone booth (Tr. 954, 1111).

At this point the FBI agents were ordered by radio to arrest the two individuals who had been in Burnell's automobile, and did so (Tr. 955, 1111). The driver of the automobile turned out to be defendant-appellant Harold Burnell, and the passenger, although he initially identified himself as Lennox Moore, turned out to be defendant-appellant Vankirk Moore (Tr. 955, 962-963, 1111). The FBI agents drove Vankirk Moore over to the telephone booths in the Nathan's parking lot, where Miss Wigfall and Samuel Huggins were waiting, and asked Miss Wigfall if she recognized him (Tr. 153-154). Miss Wigfall said that she had never seen Moore before, and Samuel Huggins, addressing Moore, said that Moore should be glad that it was the FBI rather than Samuel Huggins who had caught him (Tr. 154, 963). Moore replied that he did not know Samuel Huggins and did not know why he was threatening him (Tr. 154, 963-964). Miss Wigfall testified that Moore's voice sounded like that of the second man she had spoken to on the telephone, but that she was not absolutely sure of this identification (Tr. 154, 214-215).

The FBI agents then drove Burnell and Moore in separate cars to the FBI office in New Rochelle, New York (Tr. 964, 1112). In answer to questions, Burnell stated that he did not know where Mr. Huggins was, and that the last time he had seen Mr. Huggins was on the afternoon of

Wednesday, December 1, 1976 at H & S Transmissions (Tr. 1112, 1118). When Moore was questioned, he said that he had been driven to Korvette's by a friend named Ferdinand to buy some drapes, and that he was trying to call Ferdinand from a telephone booth just before he was arrested (Tr. 974-976). The agents then showed Moore a business card which had dropped from his person while he was being searched and which had written on the back the telephone numbers of two of the telephone booths in the Nathan's parking lot, and Moore said that he had called a girl at one of those telephone numbers (Tr. 981-982, 991, 1319, 1329-1331). The next day the agents questioned Moore again, and he said that any questions concerning Mr. Huggins's whereabouts should be directed elsewhere (Tr. 983-984).*

D. The Evidence Presented
by the Government

In addition to recounting the disappearance of Mr. Huggins, the telephone calls received by Mr. Huggins's relatives, and the arrest of the defendants, the Government's case comprised three categories of evidence: (1) identification testimony concerning the voices on the tape recordings of the telephone calls received at Miss Wigfall's apartment and at H & S Transmissions; (2) testimony concerning statements alleged to

* The District Court instructed the jury that none of Moore's post-arrest statements were to be considered against Burnell (Tr. 973).

have been made by Burnell; and (3) articles found on the defendants, in Burnell's automobile, and in Moore's apartment.

1. Identification of Voices
on the Tape Recordings

Five witnesses identified Burnell as the first speaker on the tape recordings of the telephone calls received at Miss Wigfall's apartment and at H & S Transmissions. These witnesses included Mr. Huggins's brother Glen Huggins (Tr. 802-806) and his girl friend Janet Lee (Tr. 746-748), as well as two men who frequented H & S Transmissions, Kissoon Adams and Robert Clement (Tr. 373-377, 645-648), and Burnell's common law wife, Miss Mary Burch (A52-A55). Three of these witnesses also identified Vankirk Moore as the second speaker on the tape recordings (Tr. 374, 714-716, 802-805).

The evidence concerning the identity of the person who made the telephone call to the home of Mr. Huggins's parents in Charleston, South Carolina on the evening of Wednesday, December 1, 1976 (see pp. 6-7 supra) was not consistent. Both Mr. Huggins's mother and his 16-year-old brother, Ira Huggins, who said he had listened to the telephone call, were asked to listen to the tape recordings of the telephone calls to Miss Wigfall's apartment and to H & S Transmissions. Ira Huggins identified the first speaker on the tape recordings as the man who had called (A199). His mother, on the other hand, first said that the man who had called was the second speaker on the tape recordings, and later said that the first speaker on the

tape recordings was the man who had called (A188-A189).

2. Statements Allegedly
Made by Burnell

The Government's evidence regarding statements allegedly made by Burnell came from three witnesses: Miss Mary Burch, Burnell's common law wife (A13); Kisson Adams, also known as "Kojak", a plumber who kept his tools at H & S Transmissions (Tr. 387-388); and Mr. Huggins's girl friend, Miss Janet Lee.

Miss Burch testified that some time between November 7 and November 18, 1976, Burnell had told her that Tico was planning to have Buster (Mr. Huggins) ripped off because Buster had ripped off three Rastafarians;* that only three people knew about it, Burnell, Tico, and Kojak; that Kojak was messing around and Tico was thinking of ripping him off also; that Burnell wouldn't have anything to do with it, but would go to the garage every day just as he always did; that they would hold Buster for money because Buster had a lot of money; that Burnell and Tico would split the money in half; and that Tico was having someone take care of everything and that they would probably take him out of the states where he would never be found (A17-A20, A51).**

* Rastafarians are members of a sect whose members do not eat meat or eggs and do not comb or cut their hair, which grows out naturally in "dread-locks" (A127).

** Miss Burch also testified before the grand jury on December 13, 1976, and the reporter who recorded her testimony before

Miss Burch further testified that on Saturday, December 4, 1976 she had a telephone conversation with Burnell in which Burnell said that he was going to drive down to South Carolina on Sunday, December 5, 1976 (A21-A23). Finally, Miss Burch testified that on December 10, 1976 she visited Burnell at the Metropolitan Correction Center and told him that she had told the FBI that it was his voice on the tapes and that he had told her about the ripping off of Buster, and that Burnell had replied that she did what she thought was right (A35-A36).

Kissoon Adams testified that in early November 1976 Burnell had asked him whether he wanted to make \$25,000 by joining Burnell and Tico in kidnapping Mr. Huggins for \$250,000 (Tr. 368-369). Mr. Adams testified that he had refused this invitation, and had described it to Nathaniel Freeman, also known as "Bernard", who worked at H & S Transmissions (Tr. 369-371). Mr. Adams also testified that when Burnell described

the grand jury would have testified that Miss Burch told the grand jury that Burnell told her that "Tico would have somebody take him out of the States" (A97-A98). Miss Burch testified that she had told the grand jury, as she had testified at the trial, that Burnell told her that Tico would probably have somebody take him out of the states (A39-A42).

Miss Burch testified that she had first told the FBI about these alleged statements at 10:30 P.M. on December 9, 1976 in the FBI headquarters in New Rochelle, after six hours of questioning during which she had asked to be allowed to leave and come back the next day, and during which the FBI agents told her that she could go to jail for perjury and possession of drugs (A72-A81, A113-A118). Although Miss Burch had asked to go home at about 6:00 or 7:00 P.M., it was about 2:00 A.M. when the FBI finally drove her home (A77-A79). Miss Burch was on medication on December 9, 1976, but she had not taken any of her medication that day (A116-A117).

the plan to him he took it as a joke (Tr. 497-498).

Miss Janet Lee testified that some four to six months before Mr. Huggins's disappearance Burnell told her that if she wasn't so stupid or so square, she could have had Mr. Huggins set up (Tr. 745-746). Miss Lee likewise testified that she took this as a joke (Tr. 746, 776).

3. The Physical Evidence
Introduced by the Government

The physical evidence which was introduced by the Government, over objection by the defendants, included a four-inch folding knife taken from Vankirk Moore (Tr. 957-962), a bayonet which was found under the front seat of Burrell's automobile (Tr. 1160-1169), and a .357 Magnum pistol which was found inside a locked canvas bag on the back seat of Burnell's automobile, to which Moore had the key (Tr. 978-981, 1265-1268, 1272-1274). The Government argued to the jury that it could find that these weapons were intended for use in consummating the kidnapping and in securing the ransom (Tr. 1815). The Government also introduced into evidence a brown washcloth taken from Moore (Tr. 970) and a piece of black cloth taken from Burnell (Tr. 1119-1121), which the Government argued were used by Burnell and Moore to disguise their voices over the telephone (Tr. 1816-1817). Finally, the Government introduced into evidence a key ring found in one of the apartments in which Moore lived, which contained the keys to Mr. Huggins's automobile and to the apartment which he shared with Miss

Wigfall (Tr. 1135-1138, 1380-1381). Mr. Huggins's automobile itself was found in a parking lot at Kennedy Airport, where it was parked some time between 12:00 Midnight on Wednesday, December 1, 1976 and 4:00 A.M. on Thursday, December 2, 1976 (Tr. 1152).

E. The Evidence Adduced
by the Defendants

1. Evidence Presented
by Burnell

The first witness called by Burnell was Nathaniel Freeman, or "Bernard", whom Kissoon Adams testified he had told that Burnell and Moore were going to kidnap Mr. Huggins (see pp. 15-16 supra). Mr. Freeman testified that Mr. Adams had told him that "Tico and them was going to kidnap somebody", and had not mentioned either Burnell or Mr. Huggins (Tr. 1438-1440).

After ascertaining that Mr. Freeman was familiar with Mr. Burnell's voice (Tr. 1446), Burnell's counsel played a tape recording for Mr. Freeman and asked him to identify the voices on it (Tr. 1454). Mr. Freeman identified the male voice as Burnell's and the female voice as Miss Wigfall's (Tr. 1454-1455). In fact, the male voice was that of Burnell's brother, Arthur Burnell, and the female voice belonged to a Miss Natalie Washington (Tr. 1547-1548).

Burnell also presented testimony that he had consented to a search of his apartment (Tr. 1468-1470), and that no evidence had been found there (Tr. 1500-1510).

Burnell also brought out the fact that he and Moore had voluntarily given voice samples for testing by the FBI Laboratory in Washington (Tr. 1523-1530). The Government presented no testimony regarding the results of any such testing.*

2. Evidence Presented
by Moore

Vankirk Moore's mother and father testified that the second voice on the tape recordings of the telephone calls to Mr. Huggins's relatives was not that of Vankirk Moore (Tr. 1554-1555, 1639-1642). They also testified that it is not unusual for members of their family and other Jamaicans to carry washcloths with them, because they perspire a good deal (Tr. 1557-1558, 1642-1643).

F. The Verdict of
the Jury

The jury commenced its deliberations at 9:30 A.M. on Friday, March 11, 1977 (Tr. 2043). At 10:30 A.M. the jury sent out a note which read as follows:

"Indictment. Ask for passport. Ask for transcript of grand jury of Mary Burch. Ask for also transcript of Mary Burch's testimony in this trial. Ask for two cards with telephone numbers. Ask for three tapes, one, Harold B. and Moore. Two, Burnell's brother's tapes. Tape No. 2. Ask for Mrs. Moore's

* The FBI agent who testified regarding the voice samples stated on cross-examination by the Government that Burnell's and Moore's voices sounded different when they gave the voice samples than on prior occasions (Tr. 1540-1541).

testimony, Kojak's testimony, Janet Lee's testimony, Ira Huggins' testimony." (Tr. 2044.)

The District Court requested the jury to specify more precisely what testimony it was interested in (Tr. 2048-2049).

At 12:00 Noon the jury sent out two notes which read as follows:

"Mrs. Moore's testimony. The defense lawyer's question to Mrs. Moore before he played the two tapes of Mr. Moore. The defense lawyer's question to Mrs. Moore after the tapes were played and Mrs. Moore's answer." (Tr. 2053.)

"Mary Burch's testimony pertaining to the conspiracy of Bernel.

We want the conversation between Bernel and Mary Burch where she says that Bernel and Moore were involved in the kidnapping." (Tr. 2053-2054.)

The requested testimony was read to the jury at 2:30 P.M. (Tr. 2057). At 3:45 P.M. the jury returned a verdict of guilty as to both defendants on all counts (Tr. 2059-2060).

SUMMARY OF ARGUMENT

The basic issue in the present appeal is whether the Government has established the essential jurisdictional prerequisites of the Federal crimes alleged in the indictment in the present case: the requirement of transportation of the kidnapped person in interstate or foreign commerce under the Federal kidnapping statute, 18 U.S.C. § 1201(a)(1), and the requirement of an interstate telephone call under 18 U.S.C. § 875(a).

I. The District Court charged the jury that it could rely upon the statutory presumption of 18 U.S.C. § 1201(b) that a kidnapped person who has not been released within 24 hours has been transported in interstate or foreign commerce. Under the standards enunciated by the Supreme Court in Leary v. United States, 395 U.S. 6 (1969), and succeeding cases, this presumption is unconstitutional. The District Court's reliance upon this presumption was plain error affecting the substantial rights of the defendant-appellant.

II. The District Court should have granted the motion for a judgment of acquittal on Counts One and Two of the indictment, because there was insufficient evidence for the jury to find beyond a reasonable doubt that Mr. Huggins was transported in interstate or foreign commerce. The only piece of evidence which in any way tended to indicate that Mr. Huggins might have been transported in interstate or foreign commerce was the

testimony of Miss Burch that Burnell had told her that Tico would (or would probably) have someone take Mr. Huggins out of the states, and this testimony was insufficient as a matter of law to establish that Mr. Huggins was in fact transported in interstate or foreign commerce.

III. The District Court should have granted the motion for a judgment of acquittal on Counts Three and Four of the indictment, because there was insufficient evidence for the jury to find beyond a reasonable doubt that Burnell made the telephone call to the home of Mr. Huggins's parents in Charleston, South Carolina on the evening of Wednesday, December 1, 1976, which was received by Mr. Huggins's mother and by his 16-year-old brother, Ira Huggins. The identifications of the voices on the tape recordings by Mr. Huggins's mother and by Ira Huggins were inconsistent, and were the products of a grossly suggestive identification procedure which gave rise to a very substantial likelihood of irreparable misidentification.

ARGUMENT

POINT I

THE STATUTORY PRESUMPTION OF INTERSTATE OR FOREIGN TRANSPORTATION IS UNCONSTITUTIONAL

The Federal kidnapping statute, 18 U.S.C. § 1201(a)(1), makes it a Federal crime unlawfully to kidnap any person (except in the case of a minor by a parent) where "the person is willfully transported in interstate or foreign commerce". Under the Federal kidnapping statute, the actual transportation of the person kidnapped across a State line is an essential element of the crime. See, e.g., Chatwin v. United States, 326 U.S. 455, 463-64 (1946); Hattaway v. United States, 399 F.2d 431, 433 (5th Cir. 1968). The element of interstate or foreign transportation, like all of the other essential elements of the crime, must be proved by the Government beyond a reasonable doubt. See, e.g., Mullaney v. Wilbur, 421 U.S. 684, 704 (1975); In re Winship, 397 U.S. 358, 364 (1970).

However, 18 U.S.C. § 1201(b) creates a statutory presumption that a kidnapped person who has not been released within 24 hours has been transported in interstate or foreign commerce in violation of 18 U.S.C. § 1201(a)(1). 18 U.S.C. § 1201(b) reads as follows:

"With respect to subsection (a)(1)

above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce."

In the present case, there was absolutely no direct evidence of any kind that Henry Buster Huggins, Jr. was transported in interstate or foreign commerce (see pp. 38-39 infra). Accordingly, the Government requested the District Court to charge the jury in the terms of the statutory presumption of 18 U.S.C. § 1201(b) (Government's Requests to Charge, Request No. 14). The District Court did charge the jury in terms of this presumption, as follows:

"Under the law, the failure to release a kidnapping victim within 24 hours creates a presumption that the victim has been transported in interstate or foreign commerce, and you may so find. You are not required to so find. This presumption is not conclusive, and it may be refuted or disproved by contrary evidence, and it may simply not be accepted by you as jurors.

In sum, you are to look at all the evidence, not only the presumption that I just mentioned to you but the entirety of the proof before you and decide whether or not the government has proved beyond a reasonable doubt that Buster Huggins was in fact transported in interstate or foreign commerce." (A301.)

No exception was taken to this portion of the charge. However, both defendants made motions for a judgment of acquittal on

the ground of insufficiency of the evidence, which were denied by the District Court (Tr. 1666-1688).

So far as we have been able to determine, the present case is the very first case in which a District Court has charged the jury in terms of the statutory presumption of 18 U.S.C. § 1201(b).^{*} Chief Judge Devitt and Professor Blackmar, in their handbook on Federal jury practice and procedure, recommend against the use of this presumption in charging the jury in light of the constitutional standard enunciated in Leary v. United States, 395 U.S. 6 (1969):

"No case has been found containing a discussion of the presumption of interstate transportation arising out of failure to release within 24 hours. If there is other evidence of interstate transportation it is probably prudent not to charge the jury in terms of a statutory presumption or inference. The statute states that the presumption is rebuttable. Whether it is effective or not depends on whether a rational connection appears. See Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969). The usual function of the presumption is to permit the federal authorities to enter the case and investigate." 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 43.07 (3d ed. 1977).

Appellant submits that the presumption of interstate

* In United States v. Pheaster, 544 F.2d 353, 383 (9th Cir. 1976), the Court of Appeals noted that the District Court had refused to charge the jury as to the presumption of 18 U.S.C. § 1201(b) because of its concern that the presumption was unconstitutional. In United States v. Rees, 193 F. Supp. 849, 859-60 (D. Md. 1961), the District Court discussed the presumption of 18 U.S.C. § 1201(b), but specifically noted that it had not been charged to the jury.

or foreign transportation of 18 U.S.C. § 1201(b) is indeed unconstitutional under the standards for the constitutionality of criminal presumptions enunciated by the United States Supreme Court in Leary v. United States, 395 U.S. 6 (1969), and succeeding cases. Accordingly, appellant submits that the District Court's unprecedented use of this presumption in its charge to the jury was plain error affecting the substantial rights of the appellant.

A. The Constitutional Standards
for Criminal Presumptions

As Justice Harlan observed in his opinion for the Court in Leary v. United States, 395 U.S. 6, 32-33 (1969), the modern constitutional standards for the validity of criminal presumptions stem from the decision of the Supreme Court in Tot v. United States, 319 U.S. 463 (1943). In the Tot case the Court held unconstitutional a section of the Federal Firearms Act which presumed that any person previously convicted of a crime of violence who possessed a firearm or ammunition had shipped, transported, or received the firearm or ammunition in an interstate transaction in violation of the Act. The Court formulated the standard for the constitutionality of criminal presumptions as follows:

"Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be

created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts." 319 U.S. at 467-68 (footnotes omitted).

In United States v. Gainey, 380 U.S. 63, 66-68 (1965), the Supreme Court held that a presumption that a person present at an illegal still was carrying on the business of an illegal still was constitutional under the Tot standard. In United States v. Romano, 382 U.S. 136, 139-41 (1965), on the other hand, the Court held unconstitutional a related presumption that a person present at an illegal still was in possession of the still. The Court in Romano explained the controlling difference between the two presumptions as follows:

"Presence at an operating still is sufficient evidence to prove the charge of 'carrying on' because anyone present at the site is very probably connected with the illegal enterprise. Whatever his job may be, he is at the very least aiding and abetting the substantive crime of carrying on the illegal distilling business. . . . But presence tells us nothing about what the defendant's specific function was and carries no legitimate, rational or reasonable inference that he was engaged in one of the specialized functions connected with possession, rather than in one of the supply, delivery, or operational activities having nothing to do with possession. Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to permit a reasonable inference of guilt--'the inference of the one from

proof of the other is arbitrary'
Tot v. United States, 319 U.S. 463, 467."
382 U.S. at 141.

In Leary v. United States, 395 U.S. 6 (1969), the Supreme Court held unconstitutional a statute which presumed knowledge of illegal importation of marihuana from the fact of possession of marihuana. In his opinion for the Court in Leary, after reviewing the Tot, Gainey, and Romano cases, Justice Harlan summarized their holding as follows:

"The upshot of Tot, Gainey, and Romano is, we think, that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. And in the judicial assessment the congressional determination favoring the particular presumption must, of course, weigh heavily."
395 U.S. at 36 (footnote omitted).

In a footnote at this point, the Court stated that since it found the presumption unconstitutional under this standard, it did not need to reach the question whether a criminal presumption which passes muster under this standard must also satisfy the criminal "reasonable doubt" standard if proof of an essential element of the crime charged depends upon its use.
395 U.S. at 36 n.64.

Applying this standard to the presumption of knowledge of illegal importation of marihuana, the Leary Court concluded that "in order to sustain the inference of knowledge we must find on the basis of the available materials that a majority

of marihuana possessors either are cognizant of the apparently high rate of importation or otherwise have become aware that their marihuana was grown abroad." 395 U.S. at 46-47. After an extensive review of the facts before Congress when it enacted the presumption and of all other available facts, the Court concluded that it could not make such a finding:

"We find it impossible to make such a determination. As we have seen, the materials at our disposal leave us at large to estimate even roughly the proportion of marihuana possessors who have learned in one way or another the origin of their marihuana. It must also be recognized that a not inconsiderable proportion of domestically consumed marihuana appears to have been grown in this country, and that its possessors must be taken to have 'known,' if anything, that their marihuana was not illegally imported. In short, it would be no more than speculation were we to say that even as much as a majority of possessors 'knew' the source of their marihuana.

Nor are these deficiencies in the foundation for the 'knowledge' presumption overcome by paying, as we do, the utmost deference to the congressional determination that this presumption was warranted. For Congress, no less than we, is subject to constitutional requirements, and in this instance the legislative record falls even shorter of furnishing an adequate foundation for the 'knowledge' presumption than do the more extensive materials we have examined." 395 U.S. at 52-53 (footnote omitted).

The question left open by the Supreme Court in Leary v. United States, 395 U.S. 6, 36 n.64 (1969) - whether a presumption which is used to establish an essential element of a

crime must satisfy the criminal "reasonable doubt" standard in addition to the "more likely than not" standard applied in Leary - was likewise left open by the Court in Turner v. United States, 396 U.S. 398, 416, 419 (1970), and Barnes v. United States, 412 U.S. 837, 841-46 (1973). Since its decision in Leary, however, the Supreme Court has affirmed that as a matter of constitutional due process each essential element of a crime must be proved by the Government beyond a reasonable doubt. See, e.g., Mullaney v. Wilbur, 421 U.S. 684, 704 (1975); In re Winship, 397 U.S. 358, 364 (1970). The plain implication of these decisions is that a criminal presumption which is used to establish an essential element of a crime must meet the "reasonable doubt" standard. See, e.g., McCormick, Evidence § 344, at 816 (2d ed. E. W. Cleary et al. 1972); Christie & Pye, Presumptions and Assumptions in the Criminal Law: Another View, 1970 Duke L.J. 919, 925. Compare United States v. Tavoularis, 515 F.2d 1070, 1075 (2d Cir. 1975). In any event, the presumption of 18 U.S.C. § 1201(b), as will be shown below, is unconstitutional under both the "reasonable doubt" standard and the "more likely than not" standard applied in Leary.

B. The Unconstitutionality of the Presumption of Interstate or Foreign Transportation

A review of the history of the Federal kidnapping statute confirms the lack of factual basis - and therefore the unconstitutionality - of the statutory presumption of interstate or foreign transportation embodied in 18 U.S.C. § 1201(b).

The Federal kidnapping statute was first enacted in 1932, largely in response to the Lindbergh kidnapping. 47 Stat. 326 (1932); see, e.g., Fisher & McGuire, Kidnapping and the So-Called Lindbergh Law, 12 N.Y.U.L.Q. Rev. 646, 653-55 (1935). During the Congressional debates on the enactment of the statute, many Congressmen expressed the view that the Federal Government should not usurp the power and responsibility of the States to deal with crime within their borders. See, e.g., 75 Cong. Rec. 13283-84, 13289-90, 13291-92, 13293, 13301, 13304 (1932); Hearing on H.R. 5657 Before the House Committee on the Judiciary, 72d Cong., 1st Sess., Serial 4, at 7-10 (1932). In response to these concerns, the Federal kidnapping statute was limited to cases in which the victim had been transported in interstate or foreign commerce. As first enacted in 1932, the Federal kidnapping statute did not contain any presumption like that now contained in 18 U.S.C. § 1201(b).

In 1934 the Federal kidnapping statute was amended to provide, among other things, that failure to release a kidnapping victim within seven days would create a presumption of interstate or foreign transportation of the victim. 48 Stat. 781 (1934). The amendment to the kidnapping statute was the result of a recommendation by the United States Department of Justice, which recommended a presumption of interstate or foreign transportation after three days rather than the seven days subsequently enacted by Congress. The portion of the Department of Justice recommendation relating to the proposed

presumption read as follows:

"In addition, this bill adds a proviso to the Lindbergh Act to the effect that in the absence of the return of the person kidnaped and in the absence of the apprehension of the kidnaper during a period of 3 days, the presumption arises that such person has been transported in interstate or foreign commerce, but such presumption is not conclusive.

I believe that this is a sound amendment which will clear up border-line cases, justifying Federal investigation in most of such cases and assuring the validity of Federal prosecution in numerous instances in which such prosecution would be questionable under the present form of this act." S. Rep. No. 534, 73d Cong., 2d Sess. 1 (1934).

The Department of Justice submitted no factual data in support of the proposed presumption of interstate or foreign transportation.

Neither the House nor the Senate held any hearings on the 1934 amendment to the kidnapping statute. The Senate Report on the amendment, which approved the amendment in the form recommended by the Department of Justice, simply quoted the memorandum of the Department of Justice recommending the amendment. S. Rep. No. 534, 73d Cong., 2d Sess. 1 (1934). The House Report changed the period of the proposed presumption from three days to seven days (without any explanation of the change), but likewise contained no factual data in support of the proposed presumption. The portion of the House Report relating to the proposed presumption read as follows:

"Secondly, a provision is added to the effect that the failure to release

the kidnaped person within 7 days after such kidnaping shall create a presumption that the person has been transported in interstate or foreign commerce. Such presumption is not conclusive, however.

The purpose of this provision is to clear up border line-cases, justifying Federal investigation in most of such cases and assuring the validity of Federal prosecution in numerous instances in which such prosecution would be questionable under the present form of this act. The legality of such a presumption would seem to be fairly within the rule established by the United States Supreme Court in Mobile * * * Railroad Co. v. Turnipseed, (219 U.S. 35):

That a legislative presumption of one fact from evidence of another may not constitute a denial of due process or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."* H.R. Rep. No. 1457, 73d Cong., 2d Sess. 2 (1934).

In 1956 the presumption of interstate or foreign transportation was amended to reduce the time period from seven days to one day, thus bringing 18 U.S.C. § 1201(b) to substantially its present form. 70 Stat. 1043 (1956). The sole reason given for this change was the desirability of having the FBI commence its investigation of a proposed kid-

* The Conference adopted the seven-day period enacted by the House, rather than the three-day period enacted by the Senate. The Conference Report gave no explanation for this change, and did not supply any factual support for the presumption. See H.R. Rep. No. 1595, 73d Cong., 2d Sess. 2 (1934).

napping one day, rather than seven days, after the disappearance of the victim. S. Rep. No. 2820, 84th Cong., 2d Sess. 2-3 (1956); H.R. Rep. No. 2763, 84th Cong., 2d Sess. 2-3 (1956). No factual data were presented in support of the reasonableness of the presumption that a kidnapped person who has not been released within one day has been transported in interstate or foreign commerce.

In order to sustain the presumption of 18 U.S.C. § 1201(b), even under the "more likely than not" standard applied in Leary v. United States, 395 U.S. 6 (1969), this Court must be able to state "with substantial assurance that the presumed fact [interstate or foreign transportation] is more likely than not to flow from the proved fact on which it is made to depend [failure to release a kidnapped person within 24 hours]." Leary v. United States, 395 U.S. 6, 36 (1969), quoted at p. 27 supra. Stated another way, this Court must be able to conclude that at least a majority of kidnapped persons who are not released within 24 hours are transported in interstate or foreign commerce.* See Leary v. United States, 395 U.S. 6, 46-47 (1969), discussed at pp. 27-28 supra.

* In order to sustain the presumption of 18 U.S.C. § 1201(b) under the "reasonable doubt" standard which should properly be applied (see pp. 28-29 supra), this Court would further have to find that virtually all kidnapped persons who are not released within 24 hours are transported in interstate or foreign commerce. See Barnes v. United States, 412 U.S. 837, 845-46 (1973); Turner v. United States, 396 U.S. 398, 415-18, 421-22 (1970).

There is literally no factual basis for any such conclusion. As has already been shown, Congress had no such factual basis when it created the presumption of interstate and foreign transportation in 1934, or when it changed the time period of the presumption from seven days to 24 hours in 1956 (see pp. 30-33 supra).^{*} After diligent research, we have been unable to find any data from any source with respect to the relative proportions of interstate and intrastate kidnappings among those kidnappings in which the person kidnapped is not released within 24 hours.

The lack of any factual foundation for the presumption of 18 U.S.C. § 1201(b) was expressed with great forcefulness three years ago by Representative Edwin B. Forsythe, testifying in support of proposed legislation to amend the Federal kidnapping statute. Representative Forsythe stated:

"[T]he FBI has absolutely no knowledge of how many kidnapping cases it investigates which involve the interstate transportation of the victim. There is no proof available to establish that there is a reasonable connection between the facts presumed and the facts proved." Hearings on H.R. 4191 and H.R. 8722 Before the Subcommittee on Crime of the House Committee on the Judiciary, 93d Cong., 2d Sess., Serial No. 38, at 52 (1974).

Although several representatives of the Department of Justice

^{*} Indeed, when it initially enacted the Federal kidnapping statute in 1932, Congress had before it a survey which showed that out of the 279 kidnappings reported in the survey, only 44 involved transportation across State lines. Hearing on H.R. 5657 Before the House Committee on the Judiciary, 72d Cong., 1st Sess., Serial 4, at 5 (1932).

and the FBI testified after Representative Forsythe made this statement, none of them tried to modify or refute it in any respect.

Common sense makes it plain that a kidnapping in which the person kidnapped is not released within 24 hours may just as easily be a kidnapping in which the person kidnapped is hidden in the same city, or in the same county, or in an adjacent county, as one in which the person kidnapped is taken across a State line. As in Leary v. United States, 395 U.S. 6, 53 (1969), "it would be no more than speculation" for this Court to conclude that in the majority of cases in which the person kidnapped is not released within 24 hours, such person has been transported in interstate or foreign commerce.

It necessarily follows that the presumption of 18 U.S.C. § 1201(b), that a kidnapped person who has not been released within 24 hours has been transported in interstate or foreign commerce, is unconstitutional. Moreover, the unconstitutionality of 18 U.S.C. § 1201(b) is not a close or doubtful question; it is a clear corollary of the governing constitutional standards. This fact doubtless explains why, so far as we have been able to find, the present case is the first case in which any District Court has charged a jury in terms of 18 U.S.C. § 1201(b).

C. The Charge Incorporating the
Presumption Was Plain Error
Affecting the Substantial Rights
of the Appellant

Although both defendants made motions for a judgment of acquittal on the ground of insufficiency of the evidence, which were denied by the District Court (Tr. 1666-1688), no exception was taken to the portion of the District Court's charge which charged the jury in terms of 18 U.S.C. § 1201(b). It is well established, however, that

"[i]n exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no objection has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings. [Citations omitted.] . . ."
United States v. Atkinson, 297 U.S. 157, 160 (1936).

This principle is embodied in Rule 52(b) of the Federal Rules of Criminal Procedure, which provides that plain errors or defects affecting substantial rights may be noticed although no exception was taken in the court below.

For the reasons given above, the District Court's charge in terms of 18 U.S.C. § 1201(b) was plain error. It is clear, moreover, that it affected the substantial rights of the appellant, because it allowed the jury to convict appellant of the Federal crime of kidnapping even if it found that the Government had failed to introduce any probative evidence of interstate or foreign transportation, an essential element of the Federal crime. See, e.g., Bollenbach v. United

States, 326 U.S. 607, 614 (1946).

By giving this charge, the District Court in effect charged out of the case an extremely substantial factual issue going to the question of appellant's guilt of the Federal crime of kidnapping. This was plain error which affected the substantial rights of the appellant, and which should be noticed by this Court despite the fact that no exception was taken below.* Cf., e.g., United States v. Robinson, 545 F.2d 301, 306 (2d Cir. 1976); United States v. Brown, 544 F.2d 1155, 1159 (2d Cir. 1976); United States v. Singleton, 532 F.2d 199, 206-07 (2d Cir. 1976); United States v. Howard, 506 F.2d 1131, 1133-34 (2d Cir. 1974); United States v. Clark, 475 F.2d 240, 250 (2d Cir. 1973); United States v. Lopez, 414 F.2d 272, 273 (2d Cir. 1969).

* Indeed, in the Leary case itself the Court passed upon the unconstitutionality of the presumption although there had been no objection to the charge at the trial. See Leary v. United States, 395 U.S. 6, 31-32 (1969).

It has been noted that Courts of Appeals are more ready to notice plain error in the absence of objection below in cases in which the error is of constitutional dimension or in cases in which appointed counsel represented the appellant below. 3 C. A. Wright, Federal Practice and Procedure § 856, at 375 (1969). Both of these factors are present in this case.

POINT II

THE DISTRICT COURT SHOULD HAVE GRANTED
THE MOTION FOR A JUDGMENT OF ACQUITTAL
ON COUNTS ONE AND TWO OF THE INDICTMENT

Count One of the indictment charged the defendants with conspiring to kidnap Mr. Huggins and to transport him in interstate or foreign commerce in violation of 18 U.S.C. § 1201(c) (A5-A7). Count Two of the indictment charged the defendants with kidnapping Mr. Huggins and transporting him in interstate or foreign commerce in violation of 18 U.S.C. § 1201(a)(1) (A7). The transportation of Mr. Huggins in interstate or foreign commerce was an essential jurisdictional element of both of these counts. Defendant-appellant submits that the evidence was insufficient to permit a reasonable person to find beyond a reasonable doubt that this essential element was present, and that the District Court should therefore have granted the motion for a judgment of acquittal on Counts One and Two of the indictment. United States v. Taylor, 464 F.2d 240, 242-45 (2d Cir. 1972). Defendant-appellant's motion for a judgment of acquittal on these counts was denied by the District Court (Tr. 1666-1688).

Aside from the statutory presumption of 18 U.S.C. § 1201(b) - which, as shown in Point I above, is unconstitutional, and therefore may not be considered in weighing the sufficiency of the evidence of interstate or foreign transportation - there was only one piece of evidence introduced at the trial which

in any way tended to indicate that Mr. Huggins might have been transported in interstate or foreign commerce.* This was the testimony by Miss Burch that Burnell had told her some time between November 7 and November 18, 1976 that Tico would (or would probably) have someone take Mr. Huggins out of the states, where he would never be found again (A19-A20, A39-A42, A97-A98).

The District Court suggested that this testimony came within the doctrine of Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 295-300 (1892), that statements of intention to perform an act may be evidence that the act was later performed (Tr. 322). This theory does not suffice to meet the Government's burden of establishing that Mr. Huggins was transported in interstate or foreign commerce, however, for two independent reasons.

First, in enacting the Federal Rules of Evidence, Congress made clear that the rule of Mutual Life Insurance Co. v. Hillmon does not allow the future acts of one person to be proved by the statements of another person:

* Two other pieces of evidence, upon analysis, fail to lend any support to the Government's case on the issue of interstate or foreign transportation. First, during the telephone call to Miss Wigfall at 11:30 P.M. on Friday evening, December 3, 1976, the caller said to Miss Wigfall that he was getting ready to take Mr. Huggins "out of town" that night (see p. 8 supra). The words "out of town", however, could refer to a portion of New York State outside of New York City just as readily as to a point outside of New York State. Second, Mr. Huggins's automobile was found in a parking lot at Kennedy Airport (see p. 17 supra). But there is no evidence that Mr. Huggins traveled to Kennedy Airport in the automobile, or that the automobile was parked at Kennedy Airport for any reason other than the presence there of large parking lots in which many automobiles are routinely left for weeks at a time.

"Rule 803(3) was approved in the form submitted by the Court to Congress. However, the Committee intends that the Rule be construed to limit the doctrine of Mutual Life Insurance Co. v. Hillmon, 145 U. S. 285, 295-300 (1892), so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person." H.R. Rep. No. 93-650, 93d Cong., 2d Sess. (1974), reprinted in 1974-4 U.S. Code Cong. & Admin. News 7075, 7087.

Thus, in the present case, the statement allegedly made by Burnell to Miss Burch cannot be used to prove the future conduct of the unidentified person whom Tico was supposedly going to have take Mr. Huggins out of the states.*

Second, even if the rule of Mutual Life Insurance Co. v. Hillmon were applicable to the present case, this rule does not permit a statement of intent to perform an act to serve as the sole proof that the act was later performed. See, e.g., McCormick, Evidence § 295, at 701 (2d ed. E. W. Cleary et al. 1972), and authorities cited; 4 J. B. Weinstein & M. A. Berger, Evidence ¶ 803(3)[04], at 803-104 (1976). As Judge

* The Government cannot avoid this result by arguing that the statement allegedly made by Burnell to Miss Burch was made in the furtherance of a conspiracy, because there is no evidence indicating that the unidentified person whom Tico was supposedly going to have take Mr. Huggins out of the states was a member of any conspiracy. Indeed, the District Court ruled at the close of the trial that "the case has been tried, I believe, as a case against Burnell and Moore exclusively. There has been, so far as I know, not a single scrap of evidence indicating the involvement of anyone else." (Tr. 1759.) In addition, the District Court expressly charged the jury that "there was no proof during the course of this trial that there were other conspirators than the two defendants." (A280.)

Weinstein and Professor Berger state, "declarations of intention by themselves are insufficient to support a finding that the act in question occurred." 4 J. B. Weinstein & M. A. Berger, Evidence ¶ 803(3)[04], at 803-104 (1976) (footnote omitted). A fortiori, a declaration of future intent is insufficient to sustain a conviction in a criminal case.*

For all of the foregoing reasons, the Government has failed to prove, by probative and sufficient evidence, that Mr. Huggins was in fact transported in interstate or foreign commerce. Since such proof is an indispensable element of the Federal crime of kidnapping, it follows that Counts One and Two of the indictment should be dismissed. As this Court stated in United States v. Tavoularis, 515 F.2d 1070, 1077 (2d Cir. 1975), under our system of justice a defendant "cannot be convicted unless there is proof beyond a reasonable doubt that he committed the particular crime with which he is charged."

* Moreover, the statement attributed to Burnell is in any event so vague and ambiguous as to constitute insufficient evidence of interstate or foreign transportation. The vague prediction attributed to Burnell that Mr. Huggins would be taken "out of the states" falls far short of the agreement on a definite interstate or foreign destination which is required for a violation of the Federal kidnapping conspiracy statute. See, e.g., United States v. Penn, 131 F.2d 1021 (2d Cir. 1942) (L. Hand, J.); cf., e.g., Matthews v. United States, 449 F.2d 985, 988-90 (D.C. Cir. 1971).

POINT III

THE DISTRICT COURT SHOULD HAVE GRANTED
THE MOTION FOR A JUDGMENT OF ACQUITTAL
ON COUNTS THREE AND FOUR OF THE INDICTMENT

Count Three of the indictment charged that the defendants conspired to transmit in interstate commerce a demand for ransom for the release of Mr. Huggins in violation of 18 U.S.C. §§ 371 and 875(a) (A7-A9).^{*} Count Four of the indictment charged that the defendants transmitted in interstate commerce a demand for ransom for the release of Mr. Huggins in violation of 18 U.S.C. § 875(a) (A9). In order to secure a conviction under either of these counts, the Government had the burden of proving beyond a reasonable doubt that the defendants made or conspired to make an interstate telephone call demanding ransom for the release of Mr. Huggins.

The Government sought to meet this burden by proving that defendant-appellant Harold Burnell made the telephone call to the home of Mr. Huggins's parents in Charleston, South Carolina on the evening of Wednesday, December 1, 1976 which was received by Mr. Huggins's mother and by his 16-year-old brother, Ira Huggins (see pp. 6-7 supra). Defendant-appellant submits that

^{*} Count Three of the indictment also relied upon 18 U.S.C. § 1952(a), but the District Court in its charge did not define any of the elements of a violation of that statute (see A269), and the judgment appealed from did not adjudge defendant-appellant guilty of conspiring to violate that statute (see A318). In any event, 18 U.S.C. § 1952(a), like 18 U.S.C. § 875(a), requires proof of an interstate telephone call or of the use of some other facility of interstate commerce.

the evidence adduced by the Government was insufficient as a matter of law to establish that defendant-appellant made this call, and that a judgment of acquittal should therefore have been granted on Counts Three and Four of the indictment. Defendants' motion for a judgment of acquittal on these counts was denied by the District Court (Tr. 1666-1688).

On January 18, 1977, more than a month and a half after the telephone call on Wednesday, December 1, 1976, the FBI played the tapes of the telephone calls to Miss Wigfall's apartment and H & S Transmissions for Mr. Huggins's mother, and asked her if she could recognize the voice on the tapes (A177-A180). The FBI told Mr. Huggins's mother at this time that two men had been arrested for the kidnapping of Mr. Huggins (A180). Mr. Huggins's mother picked the second voice on the tapes (which the Government contends is that of defendant-appellant Vankirk Moore) as the voice she had heard on December 1, 1976 (A188-A189). On February 11, 1977 Mr. Huggins's mother was asked to listen to the tapes again, and this time she picked the first voice on the tapes as the voice she had heard on December 1, 1976 (A184, A188-A189).

Ira Huggins, Mr. Huggins's 16-year-old brother, was not asked to listen to any tapes until February 11, 1977, almost two and one half months after the telephone call on December 1, 1976 (A208-A209). On February 11, 1977 Ira Huggins listened to the first of the two tapes, and identified the first voice (which the Government contends is that of Harold Burnell) as

the voice he had heard on December 1, 1976 (A197-A198). At the trial, over objections by defendants' counsel, the Government played the second of the two tapes for Ira Huggins, and he again identified the first voice as the voice he had heard on December 1, 1976 (A196-A199). Defendants' counsel unsuccessfully objected to this testimony on the ground that the circumstances under which Ira Huggins made this identification were unduly suggestive (A197-A199).

Defendant-appellant submits that on the basis of the foregoing evidence the jury could not reasonably find beyond a reasonable doubt that defendant-appellant Harold Burnell made the telephone call on the evening of Wednesday, December 1, 1976. Of the two persons who heard the caller on December 1, 1976 - Mr. Huggins's mother and Ira Huggins - Mr. Huggins's mother was unable to make a consistent identification, and indeed initially identified the second caller on the tapes (who the Government contends is Vankirk Moore) as the man who called her on December 1, 1976. Ira Huggins was not asked to listen to the tapes until February 11, 1977, on the eve of trial, so that his first identification came long after the telephone call on December 1, 1976. Under these circumstances, the testimony of Ira Huggins was simply insufficient to support a finding by the jury that Burnell made the telephone call on December 1, 1976.*

* There was also evidence that in two later calls to Miss Wigfall on December 2 and 3, 1976, the callers mentioned that Mr. Huggins had talked to his mother on December 1, 1976 (see

This conclusion is reinforced by the grossly suggestive circumstances under which these identifications were made. It is well established that identification testimony at trial violates due process of law if it was the result of a pretrial identification procedure which was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968); accord, e.g., Manson v. Braithwaite, 45 U.S.L.W. 4681, 4683 (U.S. June 16, 1977); Neil v. Biggers, 409 U.S. 188, 196 (1972); Foster v. California, 394 U.S. 440, 442 (1969); Stovall v. Denno, 388 U.S. 293, 302 (1967). This principle applies to voice identifications as well as to lineups and photographic identification procedures. See, e.g., Sanchell v. Parratt, 530 F.2d 286, 295-98 (8th Cir. 1976); Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966) (in banc), cited with approval in Stovall v. Denno, 388 U.S. 293, 302 (1967). The manner in which the identification in the present case was secured plainly violates this principle.

There can be no question that the circumstances under which the identification in the present case was secured were flagrantly and unnecessarily suggestive. The tapes which were

pp. 7, 8 *supra*). The callers did not say that they themselves had spoken to Mr. Huggins's mother, and their knowledge that Mr. Huggins had done so could have been derived from many sources other than participation in the December 1, 1976 call, such as general gossip about the disappearance of Mr. Huggins. Accordingly, these later statements do not constitute sufficient evidence to establish that Burnell made the telephone call on December 1, 1976.

played to Mr. Huggins's mother and to Ira Huggins were the very tapes of the telephone calls which they knew had been received at Miss Wigfall's apartment and at H & S Transmissions. They knew that the tapes were being played to them because they were expected to identify one of the voices on the tapes as the voice they had heard. Naturally, they did so - and, not surprisingly in light of the grossly suggestive method of identification used, their identifications were inconsistent.

No attempt was made to let either Mr. Huggins's mother or Ira Huggins listen to tapes of other voices. No attempt was made to let them listen to voice samples of either of the defendants speaking words other than those on the tapes of the telephone calls which had been received at Miss Wigfall's apartment and at H & S Transmissions.* It is clear that the method of identification used in the present case was unnecessarily suggestive.

It is equally clear that the method of identification used in the present case gave rise to "a very substantial likelihood of irreparable mistaken identification." Simmons v. United States, 390 U.S. 377, 384 (1968). This is made clear not only by the length of time intervening between the December 1, 1968 telephone call and the playing of the tapes - from one and one half to two and one half months - but also by the very

* As noted above (p. 18), both defendants had voluntarily given voice samples to the Government.

fact that the resulting voice identifications were conflicting.

In Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966) (in banc), which was cited with approval in Stovall v. Denno, 388 U.S. 293, 302 (1967), the Court held that a voice identification based upon hearing the voice of a single unseen suspect denied due process of law. The Court held, in words which apply equally to the present case:

"Any identification process, of course, involves danger that the percipient may be influenced by prior formed attitudes; indeed we are all too familiar with instances in which supposedly 'irrefutable' identifications were later shown to have been incorrect. Where the witness bases the identification on only part of the suspect's total personality, such as height alone, or eyes alone, or voice alone, prior suggestions will have a most fertile soil in which to grow to conviction. This is especially so when the identifier is presented with no alternative choices; there is then a strong predisposition to overcome doubts and to fasten guilt upon the lone suspect." 359 F.2d at 201 (footnote omitted).

The foregoing holding was followed in Sanchell v. Parratt, 530 F.2d 286, 297 (8th Cir. 1976), and Thomas v. Leeke, 393 F. Supp. 282, 288-90 (D.S.C. 1975).

For all of the foregoing reasons, there was insufficient evidence for the jury to find beyond a reasonable doubt that Burnell made the telephone call to the home of Mr. Huggins's parents in Charleston, South Carolina on December 1, 1976, and the motion for a judgment of acquittal on Counts Three and Four of the Complaint should have been granted.

CONCLUSION

For the reasons given above, the judgment of conviction entered against defendant-appellant Harold Burnell by the United States District Court for the Southern District of New York on April 22, 1977 should be reversed, and the case should be remanded with directions to dismiss the indictment against defendant-appellant Harold Burnell or, in the alternative, to grant a new trial to defendant-appellant Harold Burnell.

Dated: New York, New York
August 1, 1977

Respectfully submitted,

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